FILE
DEC 8
MICHAEL RODAK,

No. 80-499

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

GEORGE R. WILLIAMS, et al.,
Petitioners,

VS.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an unincorporated association, and I.L.W.U. LOCAL No. 10,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In their Response to the Petition for Certiorari, respondents do not dispute the factual record presented by petitioners. Indeed, the facts in the record are essentially uncontradicted. The District Court was not required to resolve any substantial conflicting testimony. It is the decision reached on uncontradicted facts which is at issue. It is uncontradicted that when petitioners were registered as longshoremen in 1959, they were provided with written and oral working rules with specific, graduated penalties. It is uncontradicted that petitioners worked under these rules and penalties for four years and that any infractions they committed during that period did not constitute grounds for being fired under any existing working rule or

contractual provision. Petitioners would certainly have been promptly deregistered if their conduct constituted "cause" justifying that penalty.

Respondents also agree that new penalties were adopted in 1963 and that petitioners were fired in 1963 for conduct which would not have led to firing under the rules and penalties in existence when the infractions occurred. It is uncontradicted that the sole rationale of respondents for the deregistrations in 1963 is that longshoremen could be fired for "any other cause" whatsoever. If respondents are correct that the firing of petitioners in these circumstances for "any other cause" whatsoever after four years of employment comports with the duty of fair representation and does not constitute a breach of the collective bargaining agreement, then we concede that the petition should be denied.

Respondents' position would be analogous to that of a law student, whom we shall call John Jones, who maintains an acceptable grade point average for three years of law school, only to be told a month before graduation that the required average for good standing is being changed, and that all who meet the new average will receive their diplomas, while those whose records over the past three years are not up to the new average are to be dismissed from school and become ineligible for registration. When the law student, John Jones, cries "but I met the standards for the three years I was in law school, and now you won't let me graduate after spending all this time and money—this a personal tragedy and is totally unfair", the law school administration responds that "80% of the students were able to meet the standards, even though adopted after the third year, and therefore you are simply out of luck".

If the situation in the hypothetical would constitute the law of the land, it certainly would not constitute justice,

and, in fact, it is not the law of the land, although respondents would argue to the contrary. In fact, the law of the land in the context of labor cases as it has been interpreted by this Court in its unfair representation cases over the past 36 years, is based on fundamental fairness and industrial due process. Those concepts cannot be squared with the facts of this case any more than with our law student, John Jones.

The heart of the Petition for Certiorari is that the retroactive application of the discharge penalty for non-dischargeable past conduct over the previous four years, without advance notice or forewarning, violates the concepts of fairness and industrial due process which underlie this Court's fair representation decisions of the past 36 years. The Petition pointed out that here was not one iota of evidence in the record establishing or even suggesting that petitioners were told by their collective bargaining representative or their employer that they could lose their jobs for a single infraction of the work rules at issue in this case. Understandably, respondents are satisfied with reducing the duty of fair representation to a pile of shavings when that duty is owed to persons who are excluded from union membership. That attitude on the part of employers and bargaining representatives eventually gave rise to this Court's recognition of the statutory duty to provide fair representation to all members of the bargaining unit, without respect to union membership. Respondents' reluctance to accept the principles of this Court's fair representation opinions has been graphically illustrated by their Response to the pending Petition.

General references to undefined "misconduct" and "warnings" do not overcome the glaring omission in the record of any evidence suggesting that petitioners knew or should have known that they could lose their jobs because of the conduct at issue in this dispute, where specific

graduated penalties had been in effect for four years. It is significant that respondents provide hardly any discussion about the hodge-podge collection of material in their 177-page Appendix. Close examination of their Appendix discloses that a great deal of that material relates to the issue of exhaustion of contractual remedies which was decided in petitioners' favor by the Court of Appeals.

We shall treat the remaining errors in respondents' Response seriatim.

1. In recognition of their inability to find support for the decision below in the record, respondents attempt to sweep this shortcoming under the rug by telling this Court that "[T]he issues involved in this case have been litigated three times in the appeals court". Res.5. Respondents are mistaken. The first appeal was on a pleading record and primarily involved a jurisdictional issue. 384 F.2d 935 (1967). The second appeal concerned only the liability of individual union officials for punitive damages. 421 F.2d 1287 (1970). The decision presently under review was the first occasion an appellate court considered the merits of petitioners' claims.

2. Respondents' two references to those portions of the record set out in their Appendix do not support the determination of the courts below that advance notification of any kind was given to petitioners that they could lose their jobs for the infractions involved in this dispute. These out of context excerpts are to stipulated testimony where petitioners said, "I acknowledge that I and the other B Men had to keep an absolutely clean record . . ." and that "I was from time to time admonished 'keep your nose clean' by the union". Res.10, n.14. This was the best evidence available of the "warnings" about "misconduct" said to abound in the record. Respondents' reference is to page 691 of the record where petitioners explain exactly

what they meant: "We were not to fight on the job, pilfer or bad-mouth the A men, but I did not have the impression that I had to keep an absolutely clean record on other matters. It was my impression that this related to only such things as fighting on the job, pilferage, and bad-mouthing the A men, *rather than other conduct for which penalties were specific.*" R.691 (emphasis added) Respondents' report that over 80% of the B men who worked along side of petitioners were able to meet the promotion standards. Res.1. Respondents did not produce a single one of the successful 80% to contradict the testimony of petitioners. The promotion standards, reproduced at Pet.App. 98, did not authorize the deregistration of longshoremen for the failure to maintain an absolutely clean record. Respondents can hardly be serious when they infer that petitioners lost their jobs because they failed to keep their noses clean. These examples represent respondents' best efforts to muster support in the record for their contention that petitioners had knowledge of the discharge penalty for the infractions involved in this case.

3. Another glaring omission is respondents' attempt to ignore the common law of the shop in the Pacific Coast longshore industry. In our Petition, we pointed out that officials of both the union and employer testified, without contradiction, that the tradition in this industry over 30 years of collective bargaining was to give a man a second chance and not to discharge him for the first violation of any working rule. Moreover, the practice during those 30 years never authorized deregistering a longshoreman unless there was a specific contractual provision or working rule authorizing the discharge penalty at the time the infractions occurred. Respondents' silence about these past practices of the industry, with which they are presumably well aware, is proof positive of the utter lack of support for the Ninth Circuit's failure to follow the policy laid down

by this Court in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The common law of the shop becomes a part of the collective bargaining agreement and is subject to enforcement by the courts.

Respondents have attempted to avoid judicial review of the breach of contract claim by inserting into the record something which does not exist. They misleadingly report that the Court of Appeals concluded that "the Joint Coast [Labor Relations] Committee unanimously agreed that petitioners' breach of contract claims were not meritorious and that that decision was final and binding". Res. 13-14, referring to 617 F.2d at 1327-28, Pet. App. 11-12. The Court of Appeals reached no such conclusion. It merely determined that petitioners were not barred by the exhaustion of remedies defense because they failed to pursue their contract claims to the arbitrator. The Coast Committee did not decide whether or not the petitioners' deregistrations violated the contract. It held that the deregistrations did not constitute discrimination based on race, creed, color, national origin, religious or political beliefs, membership or non-membership in the union, or activity for or against the union, within the meaning of § 13 of the collective bargaining agreement. 617 F.2d at 1326-27, Pet. App. 8-9; Findings Nos. 84-123, Pet. App. 54-66. The Court of Appeals rejected respondents' exhaustion defense to both the breach of contract and unfair representation claims. It concluded that respondents' nine-month delay in convening the grievance machinery was unreasonable. It also found that the persons representing PMA and the ILWU during the grievance proceedings had either participated in deregistering petitioners or had voiced opinions on their cases. "It is unlikely that such persons could be entirely fair and impartial." 617 F.2d at 1328-29, Pet. App. 14. The Ninth Circuit then specified its precise determina-

tion that the members of the Coast Committee "unanimously agreed that the employees' claims did not allege section 13 type discrimination." 617 F.2d at 1329-30, Pet. App. 16.

In other words, petitioners were before the Coast Committee only on their appeal of their grievances of discrimination, and not because of a direct appeal on the merits of their deregistrations. Petitioners had no right under the collective bargaining agreement to take an appeal to the Coast Committee from the decision to deregister them because they were not a "party" to the contract and there was no disagreement between the actual parties to the agreement, the union and employer, about deregistering them. The record is absolutely clear on this point.

The second preamble paragraph to the collective bargaining agreement makes clear that the only parties to the Agreement are the ILWU and PMA. "The parties hereto are the International of International Longshoremen's and Warehousemen's Union and the coastwide Pacific Maritime Association". *Local 13, Int. Longshoremen's & W. U. v. Pacific Mar. Ass'n.*, 441 F.2d 1061, 1064 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016. Section 17.261 of the collective bargaining agreement provides that only a "party" may appeal to the Coast Committee:

> Any decision of a Joint Port . . . Labor Relations Committee . . . claimed by either party to conflict with this Agreement shall immediately be referred at the request of such party to the Joint Coast Labor Relations Committee . . .

The decision to deregister petitioners was agreed to jointly by the ILWU and PMA representatives on the Port Committee on June 23, 1963. Ex. 12. Accordingly, the condition permitting an appeal from a decision of the Port Committee to the Coast Committee, namely a failure of

each respective committee to agree, did not exist. Thus, petitioners did not have the right to challenge the merits of the decision by respondents to deregister them and the breach of contract claim is not foreclosed from judicial review.

CONCLUSION

The decision of the Ninth Circuit lends judicial sanction to the total evisceration of the duty of labor unions to provide fair representation. It allows employers and unions to change the rules of the job at their whim, without regard to the legal and contractual rights of large numbers of employees who are excluded from union membership and thus excluded from the collective bargaining process. Various aspects of the factual situation in the case at bench have arisen in other cases, where a job was conditioned on an error-free employment record (*Archie v. Chicago Truck Drivers, etc.*, 585 F.2d 210, 218 (7th Cir. 1978)), and where an employee was fired because he failed to pay a dues increase without notification that his refusal would be grounds for termination (*Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 99 (3d Cir. 1968), *cert. denied sub nom. International Ass'n of Machinists v. Brady*, 393 U.S. 1048). All persons and parties involved in negotiating and administering collective bargaining agreements, as well as the lower courts, should have the benefit of the decision of this Court so that there will be uniformity of decision.

December 1, 1980.

Respectfully submitted,

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